

Before the
Federal Communications Commission

Washington, D.C. 20554

In the Matter of) MM Docket No. 95-44
)
Amendment of Section 73.202(b),) RM-8602
Table of Allotments,)
FM Broadcast Stations,)
(Fair Bluff, North Carolina))

NOV - 8 1995

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

DOCKET FILE COPY ORIGINAL

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Atlantic Broadcasting Co., Inc. ("Atlantic"), by and through counsel, and pursuant to §1.429(g) of the Commission's Rules (47 C.F.R. §1.429(g)), hereby submits its Reply to the "Opposition to Petition for Reconsideration" filed by S.O.S. Broadcasting, in the above-captioned proceeding.¹

Background

On September 11, 1995, Atlantic filed a "Consolidated Petition for Reconsideration" ("Petition") of the Commission's Order, DA 95-1772, released August 10, 1995 ("Rescission Order"), and Report and Order, DA 95-1774, released August 21, 1995 ("Report and Order II"), in the above-captioned proceeding. Atlantic is the licensee of WDAR-FM, Darlington, South Carolina, which operates on Channel 288C3 with a directional antenna to protect the vacant

¹ This Reply is timely filed pursuant to §1.429(g) of the Commission's Rules, within ten days of the filing of S.O.S.'s Opposition on October 25, 1995 (including three additional days for mailing time and not counting Commission "holidays") or by November 8, 1995.

No. of Copies rec'd
USIA B C D E

214

allotment of Channel 287A at Fair Bluff, North Carolina. In its Petition For Rule Making filed in this proceeding, Atlantic asked that the Commission to delete Channel 287A at Fair Bluff to permit WDAR-FM to modify its license to operate as an omnidirectional station. In the alternative, Atlantic asked that a 13 kilometer east site restriction be imposed on the channel.

Because it received expressions of interest in operating a station at Fair Bluff, in its initial Report and Order, DA 95-1656, released August 2, 1995 ("Report and Order I"), the Commission retained the channel and imposed the site restriction requested by Atlantic. The Commission found that "the public interest would be served by site restricting the Fair Bluff allotment as proposed in the Notice so as to enable Station WDAR-FM to expand its service area by operating omnidirectionally." The Commission rejected arguments raised by S.O.S. Broadcasting ("S.O.S.") and found that S.O.S. "provides no technical showing that a station operating within the site restricted area could not provide the required signal level to all of Fair Bluff." Report and Order I, at ¶4. With respect to S.O.S.' concern that local regulatory policies may make it difficult to locate an acceptable site with the restricted area, the Commission concluded that "S.O.S. again has failed to provide any evidence that such problems exist or are even likely."

Shortly after the release of its Report and Order I, the Commission issued its Rescission Order wherein it rescinded its earlier decision. In its Report and Order II, the Commission attempted to explain its reason for refusing to impose a

site restriction in this case. The Commission stated that it would not impose a site restriction on Channel 287A at Fair Bluff because:

It has been our general policy not to change reference coordinates for vacant in the course of a rule making proceeding in the absence of other changes in the Table of Allotments or to entertain rule making petitions solely to change reference coordinates. See, e.g., Chatom, AL, DA 95-1548, released July 18, 1995; Grenada, MS, 7 FCC Rcd 4838 (1992).

Report and Order II, at ¶4.

The Commission erroneously found that Atlantic had not proposed a change to the FM Table of Allotments, and cited reasons why it believed the imposition of a site restriction would not be in the public interest. In its Petition, Atlantic demonstrated that the Commission held rigidly to an unreasonable policy when refused to impose the site restriction requested by Atlantic. Atlantic did, in fact, propose a change to the FM Table of Allotments (the deletion of Channel 287A at Fair Bluff, North Carolina), as the Commission requires in order to consider the imposition of site restriction. Atlantic once again conclusively demonstrated that there would be no negative effect whatsoever if its requested site restriction were imposed. During the rule making proceeding, Atlantic showed that imposition of a site restriction would not prevent the filing of an application for vacant Channel 287A at Fair Bluff. Atlantic identified a possible transmitter site for potential Fair Bluff applicants, presented evidence that the site would be available, that it would more than likely comply with local zoning requirements, and that the site would obtain the approval of the FAA.

In its Petition, Atlantic also addressed each of the Commission's concerns, such as whether the imposition of site restriction would adversely affect prospective applicants that were seeking site locations for the new FM channel. Atlantic demonstrated that the ability of prospective applicants to locate an available, feasible tower site would not be harmed in this case. Atlantic further demonstrated that its proposal was in the public interest since it would permit WDAR-FM to operate omnidirectionally and provide service to an additional 3,800 persons without any negative effect on the potential for new FM service at Fair Bluff. Such a showing of public benefit should have been more than sufficient to support the imposition of a site restriction in this case.

In its Opposition, S.O.S. raises the same misplaced arguments that it raised during the rule making proceeding and that were initially rejected by the Commission its Report and Order I. As Atlantic demonstrates herein, S.O.S. has failed to show how the imposition of a site restriction on the new FM channel at Fair Bluff would have a negative impact on potential applicants for the new station or would harm the public interest.

No Harm Will Result from the Imposition of Atlantic's Requested Site Restriction at Fair Bluff, North Carolina

S.O.S. continues to argue that imposing the site restriction requested by Atlantic on Channel 287A at Fair Bluff, North Carolina, "would severely limit the choices of potential transmitter sites available to S.O.S. and other potential Fair Bluff applicants." Opposition at p. 2. S.O.S.'s concerns are entirely misplaced. There exists a technically feasible, available transmitter site for use as a location

for new tower structure for a Fair Bluff, North Carolina, FM station. On November 6, 1995, Atlantic filed an application (a copy of pertinent portions of which is attached hereto as Exhibit 1) for new FM station at Fair Bluff, North Carolina, specifying that exact transmitter site. The transmitter site proposed in Atlantic's application provides spacing protection to the Fair Bluff site restriction requested by Atlantic in this proceeding. Therefore, S.O.S's concerns about the lack of availability of transmitter sites, as well as the similar concerns of the Commission, have been rendered moot.

S.O.S. argues that Atlantic has only located one potential transmitter site. Opposition at p. 2. S.O.S. seems to imply that this may be the only transmitter site that would accommodate the Fair Bluff site restriction. However, such is not the case. In a Declaration² (Exhibit 2 hereto), Mr. Harold T. Miller, Jr., Atlantic's Vice President, states that he cannot find any evidence to support S.O.S's claim that the number of potential transmitter sites for the new Fair Bluff FM station would be limited if the site restriction requested by Atlantic were imposed. Mr. Miller states that, while searching for areas to locate a transmitter site for Atlantic's Fair Bluff application, he discovered several properties where a transmitter site could be located. Mr. Miller states that he knows of no reason why any one of those sites could not be used as a transmitter site for a new Fair Bluff station. Mr. Miller states that he knows of no zoning or FAA restrictions that would restrict the use of those properties. In addition, Mr. Miller states that

² Included as Exhibit 2 is a facsimile copy of Mr. Miller's Declaration. The original of Mr. Miller's Declaration will be supplied upon receipt.

the property specified in Atlantic's application is approximately 100 acres and the property owner stated that Atlantic could locate its tower anywhere on the property. Therefore, on that property alone, there is space for several radio towers and transmitters. As Mr. Miller's statement demonstrates, there exists a large number of potential transmitter sites from which applicants could propose to operate the new Fair Bluff FM station, even with the site restriction requested by Atlantic.

S.O.S. argues that imposition of site restriction could negatively affect parties that are in the process of preparing Fair Bluff applications and locating transmitter sites. However, a review of the Commission's database reveals that the Commission has listed for Fair Bluff, North Carolina, the site restricted coordinates requested by Atlantic - **NL 34° 21' 22" and WL 78° 54' 36"**.³ Any party who recently prepared and filed an application for Channel 287A at Fair Bluff, North Carolina, would have relied upon the coordinates listed in the Commission's database to locate a transmitter site for their application. Therefore, it appears that the applications filed during the Fair Bluff window will provide spacing protection to the site restricted reference coordinates proposed by Atlantic. Since all of the applicants will probably provide the necessary spacing protection, there is no reason why the Commission should refuse to impose the site restriction requested by Atlantic. Imposition of such a site restriction would not affect the

³ Included with Exhibit 1 hereto is Exhibit 3A of Atlantic's application for Fair Bluff which is a portion of the Commission's database which denotes the reference coordinates for Channel 287A at Fair Bluff, North Carolina.

applicants for Fair Bluff and would permit WDAR-FM to provide enhanced service.⁴

**Imposition of Site Restriction in this Case Does Not Constitute
a Change of Commission Policy**

S.O.S. argues that imposing a site restriction in this case "goes against the Commission's established policy not to change reference co-ordinates for vacant allotments without making other changes to the Table of Allotments through a rule making proceeding." Opposition at p. 3. However, Atlantic did propose a change to the FM Table in its Petition For Rulemaking. Atlantic sought the deletion of Channel 287A at Fair Bluff. The fact that three other parties submitted expressions of interest in the vacant allotment and that the Commission chose to retain Channel 287A at Fair Bluff should not have prevented the Commission from imposing the site restriction requested by Atlantic. To do so simply because no change to the FM Table of Allotments was ultimately made elevates form over substance and maintains a policy that serves no purpose and disserves the public interest.

Finally, S.O.S. makes a "Pandora's Box" type argument that: "[I]f the Commission were to change its policy and adopt Atlantic's proposal, it would be all too easy for other stations wishing to change a vacant allotment's reference co-

⁴ S.O.S. argues that the Commission in Vacaville, CA, 4 FCC Rcd 8315 (1989), held that it will allot channels with the least site restriction as possible. However, that case involved the allotment of a new FM station. The Commission chose to allot a different channel than the one requested by the petitioner rather than impose a site restriction. Nothing in that decision would suggest that imposition of a site restriction in this case would be contrary to Commission policy.

ordinates simply to propose that allotment's deletion, thus accomplishing by the back door what they could not do directly." Opposition at p. 6. To the contrary, for the Commission to impose a site restriction in this case would not constitute a change in the Commission's policy as S.O.S. suggests. The Commission has specifically stated its criteria for the imposition of a site restriction and Atlantic has met each one. Atlantic proposed a change to the FM Table of Allotments; it demonstrated that no adverse affect would result from imposition of a site restriction; and that the public interest would be greatly served by permitting the enhanced operation of WDAR-FM.

Conclusion

S.O.S. has once again failed to show why the site restriction requested by Atlantic should not have been imposed by the Commission. The Commission previously rejected the arguments raised by S.O.S. and S.O.S. is attempting to raise its misplaced concerns again in this proceeding. The Commission should recognize that it erroneously relied on S.O.S.'s disproved claims and reverse its decision in this case.

WHEREFORE, the above-premises considered, Atlantic Broadcasting Co., Inc. once again respectfully requests that the Commission **REVERSE** its Order and

Report and Order II, and impose a 12.7 kilometers (7.9 miles) northeast site restriction on vacant Channel 287A at Fair Bluff, North Carolina.

Respectfully submitted,

ATLANTIC BROADCASTING CO., INC.

A large, stylized handwritten signature in black ink, starting with a large loop and ending with a sharp, angular flourish.

By: _____

Gary S. Smithwick
Shaun A. Maher

Its Attorneys

SMITHWICK & BELENDIUK, P.C.
1990 M Street, N.W.
Suite 510
Washington, DC 20036
(202) 785-2800

November 8, 1995

d:\FAIRBLUF\REPLY

EXHIBIT 1

**Exerpts from the Atlantic Application
for Fair Bluff, North Carolina**

RETURN COPY

FCC/MELLON NOV 06 1995

LAW OFFICES

SMITHWICK & BELENDIUK, P. C.

1990 M STREET, N.W.

SUITE 510

WASHINGTON, D.C. 20036

TELECOPIER

(202) 785-2804

TELEPHONE

(202) 785-2800

November 6, 1995

VIA COURIER

Federal Communications Commission
Mass Media Services
P.O. Box 358195
Pittsburgh, PA 15251-5195
Attention: Lockbox Supervisor

Re: New FM Station
Fair Bluff, North Carolina

Dear Sir/Madam:

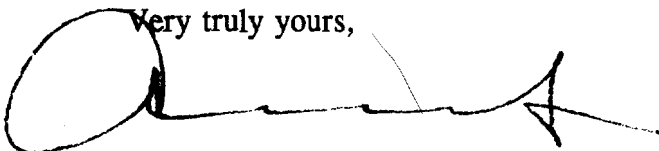
Transmitted herewith, on behalf of Atlantic Broadcasting Co., Inc., are an original and two copies of FCC Form 301, Application For New FM Station for Fair Bluff, North Carolina.

Also enclosed is a check in the amount of \$2,335.00 in payment of the filing fee (Fee Code: MTR).

Please stamp "received" the enclosed additional copy, and return it in the postage-paid self-addressed envelope provided.

If there are any questions with respect to this matter, please communicate with the undersigned.

Very truly yours,



Gary S. Smithwick
Counsel for
ATLANTIC BROADCASTING CO., INC.

GSS/df.110695a
Enclosures

cc: Fair Bluff Public File
Atlantic Broadcasting Co., Inc.

CLEARANCE STUDY FOR NEW FM STATION FAIRBLUFF, NC
USING PROPOSED SITE AS REFERENCE

REFERENCE	CLASS A	DISPLAY DATES
34 21 08 N		DATA 09-29-95
78 54 07 W	Current rules spacings	SEARCH 10-09-95
----- CHANNEL 287 -105.3 MHZ -----		

CALL TYPE	CH# LAT	CITY LNG	STATE PWR	BEAR' HT	D-KM D-M1	R-KM R-M1	MARGIN (KM)
ALOPEN	287A	Fair Bluff	NC	300.3	0.86	115.0	-114.14
AL N	34 21 22	78 54 36	0.000 kW	0M	0.5	71.5	
	95-44	WO= 950918					951019
>Site Restricted 12.7KM Northeast-Effective 9-18-95							
WYNA	285A	Tabor City	NC	170.5	22.74	31.0	-8.26 *
LI CN	34 09 00	78 51 40	1.500 kW	122M	14.1	19.3	
	Great American Media, Ltd. I				BLH810130AE		
>*To channel 285C3 Calabash, NC Per D93-249							
WYNA.A	285C2	Calabash	NC	152.0	53.62	55.0	-1.38 *
AP ZCN	33 55 32	78 37 43	50.000 kW	150M	33.3	34.2	
	Great American Media, Ltd. I				BPH950512IB		
>From channel 285A Tabor City, NC Per D93-249-One-step application							
From channel 285C3							
WDARFM	288C3	Darlington	SC	267.7	90.83	89.0	1.83 <
CP ZCN	34 18 58	79 53 17	17.000 kW	122M	56.5	55.3	
	Atlantic Broadcasting Company				BPH931229IC		951029
ALOPEN	285C3	Calabash	NC	132.2	46.91	42.0	4.91
AL N	34 04 05	78 31 30	0.000 kW	0M	29.1	26.1	
	93-249						
>Site Restricted-Effective 1-30-95-RSVD For WYNA Per D93-249							
WDCG	286C	Durham	NC	352.2	170.24	165.0	5.24
LI CN	35 52 20	79 09 29	100.000 kW	317M	105.8	102.6	
	Prism Radio Partners, L.P.				BLH880721KD		
WGQR	289A	Elizabethtown	NC	39.8	39.83	31.0	8.83
LI CN	34 37 38	78 37 23	4.300 kW	118M	24.8	19.3	
	Sound Business Inc.				BMLH920504KA		
WPDTC	286A	Johnsonville	SC	226.4	86.04	72.0	14.04
CPM CN	33 49 00	79 34 35	4.400 kW	114M	53.5	44.8	
	The Waccamaw Neck Broadcastin				BMPH940411IC		950924
WNMB	290C3	North Myrtle Beach	SC	162.8	57.80	42.0	15.80
LI ZCN	33 51 16	78 43 00	17.000 kW	110M	35.9	26.1	
	Ocean Drive Communications, I				BLH940503KA		

* - The WYNA application (BPH-950512IB) from Channel 285A to 285C2 (one step from 285C3) protects the Fairbluff allotment as a 6.0 kW facility under §73.215 contour protection rules (shortspace to the Fairbluff Allotment by 1.0 km (rounded up from 0.65 km). This proposal receives similar protection, the shortspace to BPH-950512IB is 1.0 km (rounded down from 1.38 km). Although Atlantic does not request processing under §73.215 rules Exhibit #3B demonstrates the clearance proposed by WYNA in BPH-950512IB remains valid.

287A - ALLOCATION PRINTOUT

NOTE: THE WYNA APPLICATION (BPH-950512IB) UTILIZES 73.215 PROCESSING TO PROTECT THE FAIR BLUFF ALLOCATION SITE LISTED IN THE COMMISSION'S DATABASE. THIS APPLICATION DOES NOT INCREASE THE SHORTSPACE. CONTOUR CLEARANCE IS MAINTAINED - SEE EXHIBIT #3B. THIS PROPOSAL DOES NOT REQUEST 73.215 PROCESSING.

EXHIBIT #3A

ATLANTIC BROADCASTING
NEW FM RADIO STATION
CHANNEL 287A - 105.3 MHZ
2.8 kW - 149 m HAAT
FAIR BLUFF, NORTH CAROLINA
OCTOBER 1995

GRAHAM BROCK, INC.
BROADCAST TECHNICAL CONSULTANTS

EXHIBIT 2

DECLARATION

Harold T. Miller, Jr., under penalty of perjury, declares as follows:

- 1. I am Vice President of Atlantic Broadcasting Co., Inc. ("Atlantic").**
- 2. I have reviewed the "Opposition to Petition for Reconsideration" filed by S.O.S. Broadcasting on October 25, 1995.**
- 3. On November 6, 1995, Atlantic filed an application for a construction permit for a new FM station at Fair Bluff, North Carolina. The transmitter site specified in the application is located approximately 2.0 kilometers southeast of Williamson Crossroads, on State Road 1504, in Columbus County, North Carolina, and is owned by Mr. Edward Butler.**
- 4. I cannot find any evidence to support S.O.S.' claim that the number of potential transmitter sites for the new Fair Bluff FM station would be limited if the site restriction requested by Atlantic were imposed upon the Fair Bluff allotment. When searching for areas to locate a transmitter site for the new Fair Bluff station, I discovered several properties where a transmitter site could be located. I chose Mr. Butler's property because he was willing to extend Atlantic reasonable lease terms. I know of no reason why any one of the other properties could not be used as a transmitter site for a new Fair Bluff station. I am aware of no zoning or FAA restrictions that would restrict the use of those properties. Those properties are located in rural farming areas where property owners would probably welcome the additional income from a radio station owner seeking to lease the property for a new radio tower.**
- 5. The property specified in Atlantic's application is a large parcel of land of**

11/08/95 12:42



003

approximately 100 acres. The property owner told me that Atlantic could locate its tower anywhere on his 100 acres. Therefore, on that property alone, there are many places to accommodate a radio tower and transmitter.

Executed this 8TH day of November, 1995.



Harold F. Miller, Jr.

CERTIFICATE OF SERVICE

I, Denise Felice, a secretary in the law firm of Smithwick, & Belendiuk, P.C., certify that on this 8th day of November, 1995, copies of the foregoing were sent by first class mail, postage prepaid, to the following:


Ms. Leslie K. Shapiro (*)
Allocations Branch
Mass Media Bureau, FCC
2000 M Street, N.W.
5th Floor
Washington, DC 20554

Mr. Robert Gauss
3758 Waccawache Drive
Murrells Inlet, South Carolina 29576

Mark J. Prak, Esq.
Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P.
Post Office Box 1800
Raleigh, North Carolina 27601
Counsel for Jack Miller

Anne Goodwin Crump, Esq.
Fletcher, Heald & Hildreth, P.L.C.
11th Floor
1300 North 17th Street
Rosslyn, Virginia 22209-3801
Counsel for S.O.S. Broadcasting

(*): By Hand Delivery


Denise Felice